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No. _____

In The
Supreme Court of the United States

DAVID WADKINS,

Petitioner,

v.

ROBERT ARNOLD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question One

Did the Court of Appeals err in applying the test set forth in *Malley v. Briggs* to determine whether a law enforcement officer has qualified immunity from a claim brought against him pursuant to 42 U.S.C. §1983 that he applied for and received an arrest warrant without probable cause, by adopting the position of Justice Powell's dissent which was rejected by the majority in *Malley,* that the mere fact that the magistrate issued the warrant should weigh heavily in support of a finding of qualified immunity?

Question Two

Where a district court has pointed out in a detailed opinion specific issues of material fact that preclude summary judgment for the defendant on his qualified immunity defense, did the Court of Appeals err by exercising jurisdiction over an interlocutory appeal to overrule the district court as to those specific issues and to order the granting of summary judgment?

Question Three

Did the Court of Appeals err by regarding the fact that the law enforcement officer followed the advice of counsel as compelling evidence in favor of qualified immunity even though it dismissed as irrelevant what information the law enforcement officer disclosed to counsel that formed the basis for counsel's advice, a position contrary to that of every other Circuit that has addressed the issue?

PARTIES TO THE PROCEEDING

Petitioner

David Wadkins is an individual and has no corporate affiliations.

Respondent

Robert Arnold

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 214 F.3d 535. A copy of the Opinion is included in the Appendix at Appendix A at 1a to 20a. The Opinion of the United States District Court for the Western District of Virginia is included in Appendix B at 21a to 52a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its Opinion on June 2, 2000. Petitioner filed a Petition for Rehearing *En Banc* which the United States Court of Appeals denied on June 30, 2000 (App. C. at 53a and 54a).[1] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,

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[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * * *

1871 Civil Rights Act
42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On October 1, 1996 respondent Robert Arnold, who was a deputy sheriff, applied for and obtained arrest warrants from the local magistrate for the felony arrest of petitioner Wadkins on two charges: 1) forgery of a check; and 2) obtaining money by false pretenses. Prior to seeking the warrants, Arnold purportedly received advice from the Commonwealth's Attorney to bring the charges. Wadkins was arrested pursuant to the arrest warrants. Shortly thereafter, both charges were dropped against him.

With respect to Arnold's pre-arrest investigation of the forgery, Arnold failed even to verify with the putative victim of the forgery whether the maker's signature on the check was his (it was). The bank on which the check had been drawn

had stamped on the check "insufficient funds," and Arnold had no indication whatsoever from that bank that there was any problem with the check other than insufficient funds.

The false pretenses charge centered on an insurance check with a confusing format that Wadkins' wife had submitted to a bank for deposit. Another bank and Wadkins were the co-payees. Arnold based his charge on the allegation that Wadkins was impersonating either the maker or the co-payee because the signature of "David Wadkins" was on the check twice -- on the front of the check and also on the back, even though the bank personnel denied ever believing that the two signatures were an attempt to impersonate anyone.

On September 12, 1997, Petitioner Wadkins filed a complaint against Respondent Arnold in District Court seeking damages under 42 U.S.C. § 1983 and based on state law claims alleging that Arnold had applied for the arrest warrants that resulted in Wadkins' arrest without having a reasonable belief that there was probable cause to conclude that Wadkins had committed those crimes.[2]

The District Court had jurisdiction over the original action pursuant to 28 U.S.C. §§1331 and 1343. Respondent Arnold filed a motion for summary judgment on the issue of qualified immunity and the state law claims. The District Court denied Arnold's motion for summary judgment.

The District Court found that two specific material issues of fact precluded summary judgment. One issue was

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[2] In the action, Wadkins also brought claims against The First Bank & Trust Company, which were dismissed by the District Court. No one has appealed that dismissal.

a dispute over what information Arnold conveyed to the Commonwealth's Attorney that served as a basis for his "advice" to Arnold to bring the charges. The District Court determined that that factual dispute precluded any use of the "advice of counsel" defense in support of summary judgment for Arnold.

The District Court also found that no reasonable law enforcement officer would have brought the forgery charge on a check stamped "insufficient funds," as Arnold did here, until he had at least confirmed with the alleged victim that the maker's signature was not his. With respect to the false pretenses charge, the District Court found that no reasonable law enforcement officer would have concluded that Wadkins had the intent to defraud by impersonating the bank co-payee or insurance company maker by simply signing his name twice on a confusing check, once on the front and once on the back.

Respondent filed an interlocutory appeal with the Court of Appeals for the Fourth Circuit seeking a reversal of the District Court's denial of summary judgment as to his claim of qualified immunity. On June 2, 2000, the Court of Appeals reversed the District Court's denial of summary judgment and ruled that Arnold was entitled to qualified immunity as a matter of law. Petitioner's request for *en banc* review was denied on June 30, 2000. (App. C at 53a and 54a).

ARGUMENT FOR GRANTING WRIT

In reversing the District Court's denial of summary judgment on the qualified immunity defense in this section 1983 claim alleging that the law enforcement officer

improperly sought and obtained arrest warrants, the Court of Appeals for the Fourth Circuit employed results-oriented reasoning that conflicts with and undermines the precedential value of decisions of this Court and of the Court of Appeals of other circuits. The Court of Appeals (i) applied the position of the dissent in one of this Court's landmark decisions; (ii) improperly overturned on interlocutory appeal the District Court's fact-based determination that a genuine issue of material fact precluded summary judgment; and (iii) adopted the illogical position that the facts disclosed to counsel are irrelevant to the "advice of counsel" defense, contrary to the decision of every other federal appellate court that has addressed the issue.

The published decision of the Court of Appeals is in direct conflict with this Court's landmark decision in *Malley v. Briggs*, 475 U.S. 335 (1986), which sets forth the standard for determining whether a law enforcement officer has qualified immunity in a §1983 case alleging that he improperly sought and obtained an arrest warrant. Contrary to the majority opinion in *Malley*, the Panel's decision adopts the change to the standard suggested by Justice Powell in his dissent in *Malley* – that substantial weight be given the decision of the magistrate in issuing the warrant in gauging the reasonableness of the officer's actions. Given the already onerous burden imposed on the section 1983 plaintiff by the *Malley* qualified immunity test, the Panel's change to it constitutes "a thumb on the scales" that will result in a predetermined grant of immunity to the law enforcement officer in every such case.

The Court of Appeals' decision is also in direct conflict with this Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995), in that the Panel, without jurisdiction to do so, second-guessed the District Court's rulings that the pre-

trial record set forth specific material issues of fact for trial precluding summary judgment even though the District Court adequately set forth the facts it found in dispute in a careful and thorough 26-page opinion. The Panel's decision in this regard raises both jurisdictional and practical questions of exceptional importance as to the Court of Appeal's handling of interlocutory appeals of denials of summary judgment motions for qualified immunity in §1983 cases.

The Fourth Circuit decision is also at odds with the principle set forth in this Court's decision in *Williamson v. United States*, 207 U.S. 425 (1908), and other Courts of Appeals' decisions that require that, in order to assert successfully the "advice of counsel" defense, the defendant must show that he provided counsel with all of the material facts upon which to base his advice. In its decision, the Panel eliminates as "immaterial" that requirement and threatens to open the floodgates of dubious "advice of counsel" defense claims.

The need for judicial guidance from the Court is acute. Section 1983 actions are the key, and sometimes only, method of redressing wrongs suffered by citizens at the hands of government officials. The defense of qualified immunity represents the delicate balance between the need of citizens for redress and the need for government officials to have protection from the consequences of reasonable mistakes. The Fourth Circuit's published opinion represents an important modification to the qualified immunity test set forth in *Malley v. Briggs* and; in effect, destroys that balance by converting the qualified immunity into one of *de facto* absolute immunity for the law enforcement officer who has improperly sought an arrest warrant where the warrant is subsequently issued by a magistrate. Furthermore, the issue of whether the Court of Appeals in an interlocutory appeal has

the authority to second-guess the District Court's factual determinations in its denial of a motion seeking summary judgment on the issue of qualified immunity has immense practical implications since that second-guessing on interlocutory appeal can consume inordinate amounts of the time and resources of the Court of Appeals.

And finally, in light of the fact that government officials regularly seek and receive legal advice as to their challenged actions, the Court of Appeals' ruling that the mere receipt of advice supporting their action, regardless of whether counsel had knowledge of the relevant facts upon which to base his advice, constitutes "compelling evidence" in support of a finding of qualified immunity will have widespread application and has created a split in the circuits on this important issue.

ARGUMENT 1

The Court of Appeals' decision is in direct conflict with this Court's decision in *Malley v. Briggs* by its adoption of a position in Justice Powell's dissent in that case.

In *Malley v. Briggs*, 475 U.S. 335 (1986), this Court set forth a straightforward test as to whether a law enforcement officer is protected by qualified immunity when he seeks and obtains an arrest warrant without probable cause. The test is whether "a reasonably well-trained officer in [the defendant's position] would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 345.

Justice Powell dissented from the Court's majority opinion in *Malley*. He noted that, with respect to search warrants in the context of exclusionary rule determinations, the decision by the magistrate to issue the warrant is given "substantial evidentiary weight" and argued that the same weight should be given to the magistrate's decision to issue an arrest warrant. *Id.* at 353. Of course, this position was not adopted by the majority in *Malley*, which as Justice Powell noted, gave "little evidentiary weight" to the finding of probable cause by the magistrate." *Id.* at 350-51.

Adopting the dissent's argument in *Malley*, the Panel held in its decision here that "the subsequent issuance of the [arrest] warrants by a neutral and detached magistrate weigh[s] heavily *toward* a finding that Detective Arnold is immune." (App. A at 15a) As in Justice Powell's dissent, the Panel relies on search warrant exclusionary rule precedent, such as *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). (See App. A at 19a n.9) By giving heavy weight to the magistrate's issuance of the arrest warrant in determining whether the officer acted reasonably in applying for the warrant, the Panel has thereby altered the qualified immunity test this Court set forth in *Malley* by adopting the argument in Justice Powell's dissent that was rejected by the majority opinion. Thus, *Malley* has been effectively overturned in the Fourth Circuit by this published decision.

In *every* case where the *Malley* test is applied, the officer has obtained a warrant from a magistrate or judicial officer since the test governs whether there is qualified immunity in the specific situation where the officer has applied for and obtained an arrest warrant. Thus, the Panel would add the fact of the magistrate's issuance as a heavy weight in favor of immunity in *every* case. Because a civil rights plaintiff bringing suit pursuant to section 1983 already

has a formidable burden under the *Malley* test, giving the magistrate's issuance of the warrant heavy weight in the objective reasonableness determination in effect rigs the test for a pre-determined outcome in favor of immunity for the law enforcement officer. Thus, although the Panel gives the *Malley* test lip service, it has transformed it into a meaningless exercise -- a cover for granting absolute immunity to the law enforcement officer.

As Justice Powell suggested, the majority's refusal to accord weight to the magistrate's issuance of the warrant in its test of objective reasonableness was intentional. Indeed, the majority in *Malley* specifically held as incompatible with its view of objective reasonableness the argument that the officer "is entitled to rely on the judgment of a judicial officer in finding that probable cause exists and hence issuing the warrant." 475 U.S. at 345. Instead, this Court in promulgating the test in *Malley* was implementing the policy that the officer be required to exercise his own "reasonable professional judgment." *Id.* at 346. As this Court noted, this furthers an important policy:

> [A]n officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, before submitting a request for a warrant, upon whether he has a reasonable basis for believing that his affidavit establishes probable cause. But such reflection is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature. Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or, by giving the basis for a suppression motion, benefit the guilty.

Id. at 343-44. The Court of Appeals' decision, by effectively changing the test in *Malley*, undercuts that policy.

By adopting Justice Powell's dissenting position on this issue and according heavy weight to the magistrate's issuance of the arrest warrant, the Fourth Circuit's decision converts the *Malley* standard, which by its terms already gives ample (rightfully so), yet qualified, protection to the law enforcement officer, into one of *de facto* absolute immunity.

ARGUMENT 2

Contrary to this Court's decision in *Johnson v. Jones*, the Court of Appeals improperly and without jurisdiction, second-guessed the District Court's determination that specific issues of material fact precluded summary judgment.

After addressing and answering in the affirmative the "purely legal" issue of whether there is a clearly established constitutional right to be free from arrest absent probable cause, (App. A at 7a), the Fourth Circuit then addressed the more fact-specific issue as to whether the defendant met the test of objective reasonableness that is set forth in *Malley*. It was in the Court of Appeal's determination of this second issue that, contrary to *Johnson v. Jones*, 515 U.S. 304 (1995), it improperly, and without jurisdiction, second-guessed the District court's determination that specific factual issues precluded summary judgment. The holding in *Johnson* is clear: the Court of Appeals lacks jurisdiction to review the district court's order denying qualified immunity "in so far as that order determines whether or not the pretrial record sets

forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 320 (1995).

In a detailed analysis, the District Court expressly found specific material issues of fact that precluded summary judgment. First, the District Court found that, with respect to the false pretenses charge, there was a material dispute of fact as to whether the officer thought that, based on his conversation with bank personnel, that Wadkins was impersonating the co-payee -- Americredit, or the payor -- AIC, which precluded summary judgment (App. B at 47a) The Court of Appeals simply ignores the District Court's ruling on this point and fails to address it. Importantly, the Court of Appeals makes no assertion that the District Court failed, in its detailed 26-page opinion, to set forth adequately the facts that it found were in dispute upon which it based its ruling.

Second, the District Court found that there was a material issue of fact regarding the substance of an exchange between the officer and the Commonwealth's Attorney that precluded summary judgment on the issue of whether the officer reasonably relied on the purported advice of the Commonwealth's Attorney as an additional factor to be considered in the objective reasonableness test. (App. B at 45a to 46a and 51a) Again, the Panel did not assert or imply that the District Court did not adequately set out the facts upon which it relied on this issue, which would have required (and allowed) the Court of Appeals, under *Johnson*, to resort to a detailed review of the record to make its own factual determinations. Instead, it merely disagreed with the District Court, finding that on that specific evidentiary issue there was not a material issue of fact and that the officer's exchange with the Commonwealth's Attorney constituted "compelling evidence and should appropriately be taken in to account in

assessing the reasonableness of [the officer's actions]." (App. A at 15a to 17a)

This is the very second-guessing of the District Court as to whether a specific material issue of fact even exists that is prohibited by *Johnson v. Jones*. The Court of Appeals characterizes "any dispute as to what was done during [the meeting between the officer and the Commonwealth's Attorney]" as "immaterial," while making its own determination about what aspects of the meeting are to be deemed material.

Besides second-guessing the District Court on this issue, as is discussed in detail under Argument 3, *supra*, the Court of Appeals' conclusion that the information that the law enforcement officer provided or did not provide to the Commonwealth's Attorney was immaterial is illogical and conflicts with every decision of this Court and of other circuits that have considered the issue.[3]

This Court in *Johnson v. Jones*, 515 U.S. 304 (1995), set forth many of the immensely important practical considerations supporting its conclusion that the appellate

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[3] There were many facts that the officer might have omitted that were important — and for which there is no evidence that they were conveyed to the Commonwealth's Attorney. For instance, with respect to the forgery charge, there is no evidence that he told the Commonwealth's Attorney that there was not the slightest indication from either the drawer of the check (the purported victim) or the bank upon which the check was drawn that the check was even forged (it wasn't) and that the only evidence from that bank indicated that the check was not forged — rather, it shows that the bank dishonored it because of insufficient funds (as is stamped on the check).

court does not have interlocutory jurisdiction over the rulings by a district court regarding whether there are issues of material fact precluding summary judgment, such as those the district court made here. In *Johnson,* this Court observed that district courts, unlike appellate courts, confront this kind of issue almost daily and that "[i]nstitutionally speaking, appellate judges enjoy no comparative expertise in such matters." *Id.* at 316. Furthermore, the making of factual determinations by appellate courts "can consume inordinate amounts of appellate time," "may require reading a vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials," and can "waste time in duplicating investigations of the same facts on successive appeals." *Id.* at 316-17.

ARGUMENT 3

The Court of Appeal's determination that following the advice of counsel was "compelling evidence" of the law enforcement officer's reasonableness regardless of what information he provided to counsel, is inconsistent with the decision of this Court in *Williamson* and decisions of the Seventh, Eight and Tenth Circuits.

The Panel determined that the local prosecutor's purported advice to Arnold to seek the arrest warrants was "compelling evidence" of the reasonableness of his actions. (App. A at 16a to 17a) Brushing aside the District Court's finding that there was a material issue of fact as to what information Arnold conveyed to the prosecutor that served as a basis for his advice, the Panel concluded that "any dispute as to what was done during this meeting [between Arnold and

the prosecutor] is immaterial -- what is material is that, at the meeting's conclusion, [the prosecutor] authorized the charges against Wadkins." (App. A at 15a to 16a). This conclusion is in direct conflict with the decisions of the Seventh, Eight and Tenth Circuits dealing with this issue in section 1983 cases and with the decision of this Court addressing the "advice of counsel" defense in another context.

In section 1983 cases, "advice of counsel" as a defense only comes into play in determining whether a defendant has proved that there are "extraordinary circumstances" that relieve him of his obligation to know the law governing his conduct. *See Cannon v. City of Denver,* 998 F.2d 867, 874 (10th Cir. 1993) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)); *Buonocore v. Harris*, 134 F.3d 245, 252-53 (4th Cir. 1998)("although reliance on counsel's advice may indeed by a factor to be considered in deciding whether a defendant has demonstrated an 'extraordinary circumstance,' reliance on legal advice alone does not, in and of itself, constitute an 'extraordinary circumstance' sufficient to prove entitlement to the exception to the general *Harlow* rule"). And the burden is on the defendant to prove those "extraordinary circumstances." *Harlow*, 457 U.S. at 818; *Buonocore*, 134 F.3d at 252.

The Seventh, Eighth and Tenth Circuits have all held that complete disclosure of the material facts to counsel is important as to whether following the "advice of counsel" supports a finding of "extraordinary circumstances." *See Cannon v. City of Denver*, 998 F.2d. 867, 874 (10th Cir. 1993) (relevant factor includes "whether complete information has been provided to the advising" counsel by the defendant); *Davis v. Zirkelbach*, 149 F.3d 614 (7th Cir. 1998) (same); *Kincade v. City of Blue Springs*, 64 F.3d 389, 398 (8th Cir. 1995) (dispute over what information was conveyed by

defendant to counsel precluded summary judgment on qualified immunity for relying on advice of counsel), *cert. denied,* 517 U.S. 1166 (1996).

The Panel's heavy reliance on the Ninth Circuit's decision in *Arnsberg v. United States*, 757 F.2d 971 (9th Cir. 1985), (App. A at 17a to 18a), is incredibly misplaced. In *Arnsberg*, the Ninth Circuit noted as undisputed that the law enforcement officers "accurately recounted" the relevant facts to the advising attorney upon which he based his advice.[4] 757 F.2d at 982. Thus, rather than supporting the Panel's decision on this point, the Ninth Circuit's decision in *Arnsberg* is contrary to it and is consistent with all of the other circuits that have addressed the issue.

This Court has long held that a successful "advice of counsel" defense to a criminal charge requires that the defendant "fully and honestly lays all of the facts before his counsel." *Williamson v. United States*, 207 U.S. 425, 453 (1908);[5] *see also Shale v. United States*, 388 F.2d 616, 618

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[4] Furthermore, another distinguishing factor in *Arnsberg* was that it was the advising attorney -- an Assistant U.S. Attorney -- who actually sought the arrest warrant directly from the federal magistrate. 757 F.2d at 975.

[5] This requirement is essentially identical to that of the "advice of counsel" defense to the Virginia state law claim of malicious prosecution. *See Pallas v. Zaharopoulous*, 250 S.E.2d 357, 359-60 (Va. 1979)(advice must be in response to a "full, correct and honest disclosure of all material facts known to [the defendant] or which he reasonably should have known."). The District Court found that the "conversation between the Commonwealth Attorney and Arnold" fell far short of this and was "ambiguous at best." (App. B at 51a).

(5th Cir.) ("In *Williamson* the Court spoke in terms of reliance on advice given after a full and complete disclosure."), *writ denied*, 393 U.S. 984 (1968); *United States v. McMurray*, 656 F.2d 540, 551 (10th Cir. 1980) (defense requires advice based on "full and accurate report to his attorney of all material facts"); *United States v. Martorano*, 767 F.2d 63, 66 (3rd Cir.), (defense "requires full disclosure of all material facts" to counsel), *cert. denied,* 474 U.S. 949 (1985).

The principle established by this Court in *Williamson,* that the defendant had to give full disclosure of the facts to counsel before the defendant could rely reasonably on following his counsel's advice as a defense to certain criminal charges, comports with commonsense -- advice is only as good as the facts upon which it is based. The expression "garbage in, garbage out" makes this point. As any first year associate knows, the right answer to a legal question can change based on the addition or deletion of just one material fact. This principle applies equally to the use of "advice of counsel" to prove an extraordinary circumstance relieving the defendant of section 1983 liability, as decisions of the Seventh, Eighth and Tenth Circuits have recognized.

By deeming as irrelevant to the "advice of counsel" defense in section 1983 actions whether the defendant has disclosed all of the material facts to his counsel, the Fourth Circuit has opened a Pandora's Box of possible abuse of this defense by defendants. They can now argue that a stray favorable comment by a prosecutor or other attorney with respect to a proposed arrest or other government action shields them from section 1983 liability, regardless of how little of the relevant material information the defendants disclosed to the attorney. In fact, the decision provides a powerful incentive for officials to engage in quick and superficial (or even misleading) exchanges with attorneys

prior to taking action in order to insulate themselves from potential section 1983 liability. Thus, if the decision of the Panel is permitted to stand on its reasoning on this issue, in the words a district court used to describe a similar abuse of this defense, "'advice of counsel' would be reduced to an empty shibboleth -- a password to immunity." *See Molloy v. Blanchard*, 907 F. Supp. 46 (D. R.I. 1995), *aff'd*, 115 F.3d 86 (1st Cir. 1997).

Since "few things in government are more common than the receipt of legal advice," *V-1 Oil Co. v. Wyoming*, 902 F.2d 1482, 1488 (10th Cir.), *writ denied*, 498 U.S. 920 (1990), the Fourth Circuit's holding on the "advice of counsel" defense poses a real threat to turn the *Harlow* "extraordinary circumstances" exception from one that "applies only 'rarely,'" *id.*, into one that will be successfully asserted in many, if not most, section 1983 cases. Thus, as a result of the Panel's decision, the exception threatens to swallow the rule and radically transform civil rights jurisprudence under section 1983.

CONCLUSION

The Court of Appeals' decision in this case is inconsistent with this Court's decisions in *Malley v. Briggs* and, by adopting Justice Powell's position in his dissenting opinion, effectively precludes in the Fourth Circuit any relief under section 1983 for someone who is arrested by a warrant that was obtained without probable cause -- the very cause of action at issue in *Malley*. Also, contrary to this Court's decision in *Jones*, the Court of Appeals decision improperly expands its interlocutory appeal jurisdiction to include second-guessing of the district court's determinations of issues of material fact. And, contrary to the principles of this Court's

decision in *Williamson* and decisions of the Seventh, Eighth and Tenth Circuits, the Fourth Circuit's loosening of the requirements for the use of the "advice of counsel" defense in section 1983 actions, if left standing, will open the door to its widespread unjustified and dubious use in defeating otherwise meritorious section 1983 claims.

The Petition for a Writ of Certiorari should be granted. Otherwise, this Court will suffer (a) the constructive reversal of *Malley* in the Fourth Circuit such that law enforcement officers will be accorded *de facto* absolute immunity from section 1983 claims that they sought and obtained arrest warrants without probable cause; and (b) the confusion that will arise in the courts of this land with respect to the Panel's dramatic expansion of the scope of the "advice of counsel" defense to section 1983 actions. Furthermore, if the Fourth Circuit decision is left standing as to its expansion of jurisdiction over the determination of issues of fact in interlocutory appeals beyond what this Court held was proper in *Jones*, the Court of Appeals will consume an inordinate amount of its time and effort sifting through and adjudicating those facts prematurely, a task for which it has no expertise, and will thereby further delay the resolution of meritorious section 1983 claims.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Filed June 2, 2000]

No. 99-1370

DAVID WADKINS,
Plaintiff-Appellee,

v.

ROBERT ARNOLD,
Defendant-Appellant,

and

THE FIRST BANK & TRUST COMPANY,
Defendant.

Appeal from the United States District Court
for the Western District of Virginia, at Abingdon.
Glen M. Williams, Senior District Judge.

Before WIDENER, WILLIAMS, and KING, Circuit Judges.

OPINION

KING, Circuit Judge:

David Wadkins brought this case in the Western District of Virginia against Detective Robert Arnold of the Washington County, Virginia, Sheriff's Office, alleging he was improperly arrested under warrants obtained by Detective Arnold. Mr. Wadkins asserts that Detective Arnold's actions violate his Fourth Amendment rights and also give rise to state-law claims for malicious prosecution and defamation. Detective Arnold moved for summary judgment, asserting qualified immunity. The district court denied his motion, and Detective Arnold appeals.[1] For the reasons set forth below, we reverse and remand for entry of judgment in favor of Detective Arnold.

I.

Sometime in April 1996, Mr. Wadkins's wife, Lisa, entered the First Bank and Trust Company (the "Bank") in Abingdon, Virginia. She opened a joint checking account (in her and Mr. Wadkins's name) and deposited therein a check in the sum of $1,553.80, made out to Mr. Wadkins and Americredit, a finance company, as joint payees. The maker of the check was AIC, an insurance company, and the check was apparently intended to cover damage to an automobile financed through Americredit. There were two signature

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[1] We possess jurisdiction to hear Detective Arnold's appeal under the collateral order doctrine. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

blocks on the check for the endorsements of each of the two payees. Confusingly, when the check was presented to the Bank on behalf of Mr. and Mrs. Wadkins, Mr. Wadkins's signature appeared in both signature blocks. However, Mrs. Wadkins convinced Carol Robinson, the teller, either that: (1) Mr. Wadkins's second signature functioned as the endorsement of Americredit; or (2) Americredit's endorsement was not required. In any event, Ms. Robinson allowed Mrs. Wadkins to deposit the check and to open the joint checking account.

After the account was opened, Ms. Robinson informed Mrs. Wadkins that a seven-day hold would be placed on the funds represented by the AIC check until the check cleared. Nevertheless, Mrs. Wadkins began writing checks from the new account almost immediately. Between April 15 and July 15, 1996, the Bank was presented with approximately forty-nine checks on this account. Meanwhile, AIC had notified the Bank that it would not pay the AIC check because it was improperly endorsed. The Bank promptly informed Mr. and Mrs. Wadkins, by letter of April 29, 1996, that the AIC check had been returned. Additionally, on May 29, 1996, the Bank notified Mr. and Mrs. Wadkins that Americredit had refused to endorse the AIC check because Mr. Wadkins was delinquent in his automobile payments. Despite being notified that the initial deposit of the AIC check into their account was not honored, and notwithstanding that no additional funds were ever deposited in the joint checking account, Mrs. Wadkins continued writing checks on the joint account, all of which were drawn on insufficient funds.

A second incident occurred several months later, in September 1996. Mrs. Wadkins cashed several checks at the

Bank drawn on a NationsBank account in the name of David Shiwpal. These checks were later returned due to insufficient funds in Mr. Shiwpal's account. When Roberta Looney, the Branch Manager of the Bank in Abingdon, investigated the matter, she observed that some of the Shiwpal checks had different social security numbers and addresses, and that one Shiwpal check listed an address on the same street as the Wadkins's residence. Significantly, after comparing the signature "David Shiwpal" on one of the NationsBank checks with the signature reading "David Wadkins" on the AIC check, Ms. Looney concluded that both signatures had been written by the same person. Ms. Looney therefore suspected Mr. Wadkins of forging Shiwpal's signature on the NationsBank checks cashed by Mrs. Wadkins. Believing that Mr. and Mrs. Wadkins might be involved in a check fraud scheme, Ms. Looney contacted Detective Arnold, a veteran of twenty years with the Sheriff's Office. Detective Arnold had previously investigated several bad check cases involving the Bank. After conferring with Ms. Looney and examining the documentary evidence provided to him, Detective Arnold decided to institute a formal investigation.

Following further inquiry, Detective Arnold appeared before a Washington County Magistrate, Edward L. VanHoy, seeking a warrant charging Mr. Wadkins with forgery. Rather than issue the warrant, however, the Magistrate requested that Detective Arnold consult with the Commonwealth's Attorney for Washington County, Dennis Godfrey. Detective Arnold promptly did so, and at the culmination of his meeting with Mr. Godfrey, the prosecutor authorized him to initiate two criminal charges against Wadkins. Detective Arnold then returned to Magistrate VanHoy seeking warrants against Wadkins for: (1) obtaining

money by false pretenses, in violation of Va. Code Ann. § 18.2-178; and (2) forgery, in violation of Va. Code Ann. § 18.2-172. These warrants were issued by the Magistrate on October 1, 1996.

After learning of the outstanding warrants, Wadkins voluntarily surrendered at the Washington County Sheriff's Office, and he was released on bond by the Magistrate. However, the Commonwealth's Attorney later decided not to prosecute Wadkins on either of the charges. The prosecutor's nolle prosequi decision was based largely on an affidavit of Mr. Shiwpal, submitted to Godfrey on behalf of Wadkins, in which Shiwpal indicated that: (1) he had in fact written checks payable to Lisa Wadkins; and (2) neither David nor Lisa Wadkins had "ever forged checks on my account and I have not requested anyone to file charges pertaining to the same." J.A. 311.[2]

On September 12, 1997, Mr. Wadkins filed this action against the Bank and Detective Arnold, pursuant to 42 U.S.C.

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[2] Although the Shiwpal affidavit did not address the false pretenses charge (that Wadkins had attempted to obtain money by signing the signature of Americredit on the AIC check), that charge was also dropped. This aspect of the nolle prosequi decision was apparently attributable to the lack of evidence that the AIC check carried a signature purporting to be that of Americredit.

We note that a nolle prosequi, if entered before jeopardy attaches, is without prejudice to further prosecution. *Cummings v. Commonwealth*, 481 S.E.2d 493, 494 (Va. Ct. App. 1997) (citation omitted).

§ 1983 and Virginia state law. Detective Arnold moved for summary judgment, contending that he was entitled to qualified immunity.[3] The district court denied Detective Arnold's motion, and he now appeals.

II.

We review de novo the district court's denial of Detective Arnold's motion for summary judgment based on qualified immunity. *See Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992). As in any context, summary judgment is appropriate only if (1) there are no genuine issues of material fact;[4] and (2) based on the undisputed facts, the

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[3] The Bank also moved for summary judgment, arguing that it was immune from liability because it was not a state actor for purposes of 42 U.S.C. § 1983. The district court agreed and granted summary judgment to the Bank by order of February 19, 1999. This order has not been appealed.

[4] Pursuant to the Supreme Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995), we lack jurisdiction to review the district court's order denying qualified immunity "insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." Id. at 320. However, there is no material dispute in this case regarding the manner of Detective Arnold's investigation and the information obtained and procedures followed prior to seeking the warrants. Accordingly, whether Detective Arnold is entitled to qualified immunity in this case is solely a question of law. *See Gould v. Davis* , 165 F.3d 265, 269 (4th Cir. 1998) (although "different facts in evidence could be used to support different conclusions as to whether the officers deserve qualified immunity, this does not indicate a factual dispute, but

movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

III.

Detective Arnold argues that the district court erred in denying his motion for summary judgment, asserting that he is entitled to qualified immunity on two grounds. First, he contends that there is no clearly established constitutional right to be free from arrest absent probable cause; thus, Mr. Wadkins failed to allege a deprivation of a constitutional right. Second, even if the arrest of Wadkins violated a clearly established constitutional right, Detective Arnold maintains that he is nevertheless entitled to qualified immunity because he acted reasonably; that is, a reasonable person in his position would not have known that his actions were unlawful. Because Detective Arnold's first argument fails on the reasoning of the district court, *Wadkins v. Arnold*, No. 97-0151-A, mem. op. at 12-13 (W.D. Va. Feb. 19, 1999), we focus our inquiry on Arnold's second argument-- that he is entitled to qualified immunity based on the reasonableness of his actions.[5]

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rather, a question of law.").

[5] Although not at issue, we note that neither the Magistrate nor the Commonwealth's Attorney were sued, and neither of them should properly be susceptible to suit. As a judicial officer performing an act within his judicial capacity -- directing the issuance of warrants against Wadkins -- the Magistrate was absolutely immune from suit. *See Pressly v. Gregory*, 831 F.2d 514, 517 (4th Cir. 1987). Likewise, the prosecutor's decision to authorize the prosecution of Wadkins should be protected by

A.

1.

Wadkins asserts that no reasonable officer in Detective Arnold's position could have concluded that he possessed enough information to establish probable cause for seeking an arrest warrant. In assessing the objective reasonableness of Detective Arnold's actions, the absence of probable cause is not determinative. Rather, where a law enforcement officer acts pursuant to a warrant, the critical question is whether the officer *could have reasonably thought* there was probable cause to seek the warrant. As the Supreme Court recognized in *Malley v. Briggs*, 475 U.S. 335 (1986), "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost." *Id.* at 344-45 (citation omitted). In explaining why the absence of probable cause is not determinative, the Supreme Court has observed:

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absolute immunity. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) ("[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity."). Although the district court indicated that, in its view, the Commonwealth's Attorney might not be entitled to absolute immunity under these facts, we would be constrained to disagree. In *Springmen v. Williams*, 122 F.3d 211, 212-13 (4th Cir. 1997), we held that the doctrine of absolute immunity "squarely covers a prosecutor's decision to go forward with a prosecution."

> [I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials -- like other officials who act in ways they reasonably believe to be lawful -- should not be held personally liable.

Anderson v. Creighton, 483 U.S. 635, 641 (1987) (citing *Malley*, 475 U.S. at 344-45). Therefore, Detective Arnold may be entitled to qualified immunity even if the warrants at issue are later determined to have been lacking in probable cause. Nevertheless, the legal principles relating to the probable cause standard provide a convenient starting point for our analysis of the reasonableness of Detective Arnold's actions.

2.

Probable cause exists when the facts and circumstances within an officer's knowledge -- or of which he possesses reasonably trustworthy information -- are sufficient in themselves to convince a person of reasonable caution that an offense has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (citation omitted). In assessing whether probable cause exists, we must examine the totality of the circumstances. *Taylor v. Waters*, 81 F.3d 429, 434 (4th Cir. 1996) (citing *United States v. Al-Talib*, 55 F.3d 923, 931 (4th Cir. 1995)). Determining whether the information surrounding an arrest suffices to establish probable cause is an individualized and fact-specific inquiry. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). Accordingly, we direct our attention to the circumstances

surrounding Detective Arnold's efforts to obtain the arrest warrants in this case.

In Virginia, a person is guilty of obtaining money by false pretenses if he "obtain[s], by any false pretense or token, from any person, with intent to defraud, money or other property . . . or if he obtain[s], by any false pretense or token, with such intent, the signature of any person to a writing, the false making whereof would be forgery. . . ." Va. Code Ann. § 18.2-178 (Michie 1999). Prior to seeking the false pretenses warrant, Detective Arnold had compiled at least the following information: (1) AIC had issued a check to Mr. Wadkins and Americredit as joint payees; (2) in an attempt to deposit the AIC check and open a joint checking account on behalf of Mr. Wadkins and herself, Mrs. Wadkins pointed out two signatures to the bank teller, both of which she claimed were her husband's; (3) one of Mr. Wadkins's signatures on the AIC check was in the signature block reserved for the endorsement of Americredit; (4) Americredit never endorsed the check; (5) AIC notified the Bank that it would not pay the check because it was improperly endorsed; (6) the Bank notified Mr. and Mrs. Wadkins that the AIC check had been returned and that Americredit did not intend to endorse it; and (7) because the initial deposit was not honored and no additional funds were ever deposited in the Wadkins' newly opened checking account, over forty insufficient checks were written by Mrs. Wadkins on the joint account.

With respect to the forgery charge, a person is guilty of forgery in Virginia if he "forge[s] any writing . . . to the prejudice of another's right, or utter[s], or attempt[s] to employ as true, such forged writing, knowing it to be

forged . . ." Va. Code Ann.§ 18.2-172 (Michie 1999). At the time he sought the forgery warrant, Detective Arnold possessed at least the following information regarding the alleged forgery: (1) the branch manager of the Bank, Mrs. Looney, had compared the two signatures and concluded that they were similar; (2) Detective Arnold made the same comparison and reached the same conclusion;[6] (3) various Shiwpal checks listed different social security numbers and mailing addresses; and (4) the circumstances of the joint checking account and the fact that over forty bad checks had been written in connection with that account.

Based on the totality of these facts, Detective Arnold approached the Magistrate seeking a warrant to arrest Wadkins -- initially only on a forgery charge. Instead of issuing the warrant, however, the Magistrate requested

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[6] The district court was concerned that neither Ms. Looney nor Detective Arnold were trained in handwriting comparison. J.A. 701-02. However, given Ms. Looney's experience in the banking industry and Detective Arnold's experience investigating "bad check" cases, both Looney and Arnold appear qualified to testify as to their conclusions. *See Wileman v. Commonwealth*, 484 S.E.2d 621, 624 (Va. Ct. App. 1997) (bank vice president with twenty-four years of banking experience, whose duties involved verification of customer signatures, was qualified to give expert opinion testimony comparing signatures). Moreover, as the district court acknowledged, even the non-expert comparison of hand-written signatures could be a valid factor in assessing probable cause.

Detective Arnold to consult with the Commonwealth's Attorney "to see if there could be another charge. . . ." J.A. 246. In turn, the Commonwealth's Attorney, Mr. Godfrey, authorized two criminal charges against Wadkins: (1) obtaining money by false pretenses; and (2) forgery. Detective Arnold then returned to the Magistrate, who promptly issued the two warrants against Wadkins.

B.

1.

In denying Detective Arnold's motion for summary judgment, the district court declined to conclude that Arnold reasonably believed that probable cause existed to arrest Wadkins on either charge. In reaching this determination with respect to the false pretenses charge, the district court correctly noted that "One who signs a check in the wrong place has not committed the offense of obtaining money by false pretenses, unless it was done with criminal intent." J.A. 708 (citing Va. Code Ann. § 18.2-178). Nevertheless, the district court found that no reasonable officer could have inferred such intent on the part of Wadkins, stating, "It is difficult to imagine that an individual bent on fraud would attempt to provide the signatures of two different people by signing his own name twice." J.A. 708.

We disagree. As the district court recognized, "[S]urrounding circumstances, even circumstances that appear innocent when considered alone, may provide a basis for finding probable cause." J.A. 703 (citing *Porterfield v. Lott*, 156 F.3d 563, 570 (4th Cir. 1998)). The district court acknowledged that the circumstances surrounding the deposit

of the AIC check, including the behavior of Mrs. Wadkins, could properly be taken into account at the probable cause stage of a criminal prosecution. Suspecting the existence of an illegal check scheme, Detective Arnold therefore properly considered facts in addition to the appearance of Wadkins's signature in two places on the AIC check. In particular, both the misrepresentation to the Bank that the AIC check was properly endorsed, and the substantial number of bad checks written on the Wadkins's joint account, informed Detective Arnold's probable cause assessment. In light of all these facts, we conclude that Arnold could have reasonably inferred Wadkins's intent to defraud.

With respect to the forgery charge, the district court seized upon Detective Arnold's failure to contact Shiwpal during the course of his investigation: "[A] reasonable officer should at least have contacted Shiwpal and asked him if the disputed signature was his." J.A. 702. Shiwpal ultimately averred that Wadkins had not forged his signature; presumably, Shiwpal would have informed Detective Arnold of the same had he been asked earlier. Finding Shiwpal's statement to be a "key piece of evidence," the district court concluded that "a reasonable officer should have obtained it before seeking the warrants." J.A. 702. The district court's conclusion was based largely on our decision in *Clipper v. Takoma Park*, 876 F.2d 17 (4th Cir. 1989), where we held that a law enforcement officer's failure to pursue an easily obtainable piece of information that could completely exculpate a suspect weighed heavily against a finding that the officer's conduct was reasonable. *Id.* at 20. *See also Sevigny v. Dicksey*, 846 F.2d 953, 957-58 (4th Cir. 1988) (holding officer who neglected to "avail himself of readily available

information" which would have exculpated the plaintiff was not entitled to qualified immunity for unlawful arrest).

Here, however, Detective Arnold did not "fail to pursue" readily available information. Indeed, Detective Arnold attempted on several occasions, without success, to contact Shiwpal, both in person and via telephone. Even if he had not tried to contact Shiwpal, however, the failure to pursue a potentially exculpatory lead -- standing alone – is not determinative. *Clipper*, 876 F.2d at 20. Although an officer may not disregard readily available exculpatory evidence of which he is aware, the failure to pursue a potentially exculpatory lead is not sufficient to negate probable cause. *Smith v. Reddy*, 101 F.3d 351, 357 (4th Cir. 1996) (citing *Torchinsky v. Siwinski* , 942 F.2d 257, 264 (4th Cir. 1991)).[7] Reasonable law enforcement officers are not required to "exhaust every potentially exculpatory lead or resolve every doubt about a suspect's guilt before probable cause is established." *Torchinsky*, 942 F.2d at 264 (citing *Krause v. Bennett*, 887 F.2d 362, 371 (2d Cir. 1989) ("[P]robable cause

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[7] In our *Torchinsky* decision, we explained the rationale behind this approach:

> It will, of course, always be possible to contend in court that an arresting officer might have gathered more evidence, but judges cannot pursue all the steps a police officer might have taken that might have shaken his belief in the existence of probable cause.

942 F.2d at 264.

does not require an officer to be certain that subsequent prosecution of the arrestee will be successful.")). Accordingly, Detective Arnold's failure to speak with Shiwpal prior to seeking the arrest warrants does not per se render his actions unreasonable.

2.

Conversely, Detective Arnold's conference with the Commonwealth's Attorney and the subsequent issuance of the warrants by a neutral and detached magistrate weigh heavily *toward* a finding that Detective Arnold is immune. At the specific request of the Magistrate, Detective Arnold conferred with the Commonwealth's Attorney, who in turn explicitly authorized both of the charges in question. The district court, concerned by the absence of evidence in the record detailing precisely what information Detective Arnold provided to the prosecutor during this conference, concluded that it could not decide, as a matter of law, whether Mr. Godfrey's advice rendered Detective Arnold's actions objectively reasonable: "Arnold may have offered so little information to the prosecutor that he cannot be said to have acted reasonably even if he acted on the prosecutor's advice. These facts must be determined by the jury." J.A. 706.

Admittedly, beyond Detective Arnold's statement that he showed Godfrey the checks in question, the record does not fully reveal the extent of the evidence Arnold presented to the Commonwealth's Attorney. However, Wadkins does not allege that Detective Arnold acted in bad faith or that he provided misleading information to the Commonwealth's Attorney. Accordingly, any dispute as to what was done during this meeting is immaterial -- what is material is that, at

the meeting's conclusion, Godfrey authorized the charges against Wadkins. Indeed, the district court admitted that "[c]ommon sense tells us that Detective Arnold did some explaining -- he did not simply enter the prosecutor's office and mutely display various checks to him." J.A. 706. We agree with these common sense instincts, and we believe the district court placed too much emphasis on the absence of the specific contents of Detective Arnold's conference with the prosecutor. The most compelling aspect of this conference is clear: at its conclusion, the Commonwealth's Attorney, on behalf of the Commonwealth of Virginia, authorized warrants for the arrest of Wadkins.[8]

Of course, the mere fact that Detective Arnold acted upon the Commonwealth's Attorney's authorization in applying for the warrants does not automatically cloak Arnold with the shield of qualified immunity. However, this authorization -- by the elected chief law enforcement officer

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[8] As Detective Arnold's uncontradicted deposition makes clear, it was the Commonwealth's Attorney who authorized prosecution against David Wadkins:

> Q: Then who exactly selected the charges that were brought against David Wadkins?
> A: The Commonwealth's Attorney.
> . . . .
> Q: And who was it that decided to charge David Wadkins . . . in this case?
> A: The Commonwealth's Attorney.

J.A. 285.

of Washington County -- is compelling evidence and should appropriately be taken into account in assessing the reasonableness of Arnold's actions. *See Pritchett*, 973 F.2d at 316 ("[T]he most obvious possibility [of exceptional circumstances supporting qualified immunity despite the violation of a clearly established constitutional right] is mistaken official advice by legal counsel."); *accord Buonocore v. Harris*, 134 F.3d 245, 253 (4th Cir. 1998) (although reliance on advice of counsel alone does not constitute "extraordinary circumstance," reliance on the advice of counsel is a factor to be considered).

In our analysis of this aspect of the case, we find instructive the Ninth Circuit's decision in *Arnsberg v. United States*, 757 F.2d 971 (9th Cir. 1985). In *Arnsberg*, two Internal Revenue Service agents were sued after executing an arrest warrant for a material witness. Prior to seeking the warrant, the agents consulted with an Assistant United States Attorney. After describing the difficulties they had encountered in attempting to serve the witness personally, the prosecutor concluded that the facts justified the issuance of a material witness warrant, pursuant to 18 U.S.C. § 3149 (1982) (current version at 18 U.S.C. § 3144), which authorizes the arrest of material witnesses whose presence cannot practicably be secured by subpoena. A Magistrate Judge then issued a warrant, which the two agents executed later the same day. The district court subsequently found the warrant invalid because, in its view, "the difficulties encountered by agents Weiler and Maney in attempting to serve Arnsberg did not establish probable cause for believing that it would be impracticable to secure Arnsberg's presence by subpoena." 757 F.2d at 976.

Although the Ninth Circuit agreed with the district court's probable cause assessment, it concluded that the agents were nevertheless entitled to qualified immunity: "Counsel's advice would prevent a reasonable person from knowing that Arnsberg's constitutional rights were being violated." *Id.* at 982. The Ninth Circuit explained:

> Reasonable attorneys could disagree with our probable cause assessment. *It would be plainly unreasonable to rule that the arresting officers . . . must take issue with the considered judgment of an assistant United States Attorney and the federal magistrate*. Not only would such a rule cause an undesirable delay in the execution of warrants, but it would also mean that lay officers must at their own risk second-guess the legal assessments of trained lawyers.

Id. at 981 (emphasis added). The rationale embodied in the *Arnsberg* decision clearly applies in this case.

Furthermore, it is important that the Washington County Magistrate agreed with both Detective Arnold's and the prosecutor's assessment of probable cause, and the magistrate determined to issue the warrants. Admittedly, if a reasonable officer in Detective Arnold's position should not have applied for the warrants, then Arnold would not be shielded from liability simply because the Magistrate decided to issue them. *Malley*, 475 U.S. at 345-46. However, given our conclusion that Detective Arnold was reasonable in seeking the warrants, the fact that the Magistrate subsequently issued them bolsters the reasonableness of Detective Arnold's

actions. As Chief Judge Wilkinson aptly observed in *Torchinsky*:

> When a police officer protects a suspect's rights by obtaining a warrant from a neutral magistrate, the officer should, in turn, receive some protection from suit under 42 U.S.C. § 1983. Otherwise, the threat of liability would force officers to continuously second-guess the considered decisions of magistrates. This in turn would promote delay in the execution of warrants, and alter the proper allocation of law enforcement functions.

942 F.2d at 262.[9]

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[9] In *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), albeit in a different context (the application of the exclusionary rule of evidence with respect to a defective search warrant), the Supreme Court expressed sentiments that are informative here:

> Whatever an officer may be required to do when he executes a warrant . . . we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested.

Id. at 989-90.

In this case, Detective Arnold took steps reasonably expected of him. The question before us is not whether he exhausted every potential avenue of investigation. Rather, for purposes of qualified immunity, we must simply determine whether Detective Arnold's actions were reasonable under the circumstances. That his efforts could have been more thorough, or even that his actions may have been mistaken, does not mean that they were *unreasonable*. As we stated in *Torchinsky*, "If reasonable mistakes were actionable, difficult questions of discretion would always be resolved in favor of inaction, and effective law enforcement would be lost." *Id.* at 261. In sum, there is simply no basis for a rule that would require law enforcement officers to take issue with or second-guess the considered judgments of prosecutors and magistrates. *Arnsberg*, 757 F.2d at 981.

IV.

Pursuant to the foregoing, Detective Arnold's actions satisfy the requirements of objective reasonableness upon which qualified immunity rests. We therefore reverse and remand for entry of judgment in favor of Detective Arnold.

REVERSED AND REMANDED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ABINGDON DIVISION

[Filed February 19, 1999]

No. 97-0151-A

DAVID WADKINS,
Plaintiff,

v.

ROBERT ARNOLD and THE FIRST BANK AND TRUST COMPANY,
Defendants.

MEMORANDUM OPINION

I. Facts and Procedural History

This is an action under 42 U.S.C. § 1983 and state law brought by David Wadkins against Detective Robert "Bobby" Arnold of the Washington County, Virginia Sheriff's Office[1]

[1] Arnold has been sued only in his individual capacity.

and the First Bank and Trust Company ("the Bank"). Wadkins claims that as a result of various transactions involving his wife, Lisa Wadkins, and others, Bank employees began to suspect him of participating in a check fraud scheme. The Bank notified Detective Arnold of these suspicions, and, according to Wadkins, the Bank and Arnold conspired to have him arrested in violation of his civil rights.

The essential facts that led up to Wadkins' arrest are undisputed, except where noted. In April of 1996, Lisa Wadkins entered the Abingdon, Virginia branch of First Bank and Trust. She opened a checking account there, using a check made out to her husband, David, and Americredit, a finance company, as joint payees ("the AIC check"). The maker of the check was AIC, an insurance company, and the check was apparently intended to cover damage to a car financed through Americredit. The check featured several signature blocks, including one each for the endorsements of Wadkins and Americredit, the two payees. Lisa Wadkins pointed out to the teller a signature that she identified as David Wadkins' endorsement, and also pointed out a second signature by David Wadkins. Lisa apparently told the teller either that this second signature operated as the endorsement of Americredit, or that no Americredit endorsement was needed. In any event, a signature reading "David Wadkins" appears in two places on the check.

After opening an account for the Wadkins, the teller told Lisa that there would be a hold placed on the funds represented by the AIC check. In other words, the money would not be available to the Wadkins until the AIC check "cleared." Nevertheless, Lisa Wadkins apparently began writing checks on the account immediately. Eventually, AIC

notified the bank that it would not pay the check, because it was not properly endorsed. Thus, no money was ever placed in the First Bank and Trust Account to cover the checks written by Lisa Wadkins.

A second transaction also led to Wadkins' arrest. In September of 1996, Lisa Wadkins attempted to cash several checks at various First Bank and Trust branches. These checks were drawn on the NationsBank account of David Shiwpal. The checks were later returned due to insufficient funds in Shiwpal's account. The Abingdon branch manager of First Bank and Trust, Roberta Looney, noticed that some of the Shiwpal checks bore different social security numbers and addresses, and that one of the addresses was on the same street as the Wadkins' residence. When she compared the signature reading "David Shiwpal" on one of the checks to the signature reading "David Wadkins" on the AIC check, she concluded that the same person had signed both checks. This led Looney to suspect that David Wadkins had forged the signature of David Shiwpal.

Along with these two transactions, there was apparently some other questionable activity on the part of Lisa Wadkins and others who may or may not have been friends or neighbors of David or Lisa Wadkins. In all, there were approximately 40 bad checks drawn on or associated with the Wadkins account.

Faced with all of these circumstances, Roberta Looney began to suspect that some sort of organized check fraud scheme was afoot. She placed a call directly to Detective Arnold, who had apparently handled "bad check" cases for the bank on previous occasions. After talking with Looney

and examining the evidence himself, Arnold began an investigation. Shortly thereafter, he elected to seek arrest warrants for David Wadkins. Arnold appeared before a magistrate, who declined to issue warrants, and recommended that Arnold speak with the Commonwealth's Attorney for Washington County, Dennis Godfrey. Arnold did so.

There is no evidence as to the exact conversation between Arnold and the prosecutor. However, Arnold has testified that he presented the evidence that he had collected thus far, and that the Commonwealth's Attorney instructed him to bring charges against Wadkins.

Arnold returned to the magistrate and sought warrants for Wadkins' arrest on two charges. With regard to the AIC check, Arnold thought Wadkins guilty of obtaining money by false pretenses in violation of Va. Code 18.2-178. It was apparently Arnold's theory that Wadkins, by signing the check twice, had attempted to supply the endorsement of the other payee, Americredit.[2] With regard to one of the David Shiwpal checks, Arnold accused Wadkins of forging the signature of David Shiwpal in violation of Va. Code 18.2-172. This time, the magistrate issued the warrants.

When Wadkins learned of the outstanding warrants in October of 1996, he appeared at the Washington County Sheriff's Office and was arrested. The state later elected not to prosecute either charge against Wadkins.

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[2] There is some confusion as to whether Arnold's theory was that Wadkins was impersonating the payee, Americredit, or the maker, AIC. This point will be discussed below.

Plaintiff argues that the actions of Arnold and the Bank constitute a violation of his right to be free from unreasonable seizure guaranteed by the Fourth Amendment to the United States Constitution, and also give rise to state-law tort claims for malicious prosecution and defamation. Wadkins' theory is that Arnold and the Bank conspired to have him arrested without probable cause, in an effort to recoup the money that the Bank had lost on the various bad checks. According to Wadkins, Arnold failed to perform a proper investigation before having Wadkins arrested, and was in reality abusing his authority by acting as a debt collector for the Bank. Both the Bank and Detective Arnold have filed Motions for Summary Judgment. Detective Arnold has additionally asserted the defense of qualified immunity.

The court exercises jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

II. Summary Judgment Standard

Summary judgment is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In deciding a motion for summary judgment, a court must view all evidence and inferences in the light most favorable to the non-moving party. Anderson, 477 U.S. at 255.

III. Law and Discussion

42 U.S.C. § 1983 provides in pertinent part that

> [e]very person who, under color of any statute . . . of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to any deprivation of rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Section 1983 does not create any substantive right. Rather, § 1983 provides a mechanism by which a plaintiff may seek relief for a violation of certain rights in federal court. Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).

In order to state a claim under § 1983, a plaintiff must satisfy two requirements. First, the plaintiff must allege violation of a right "secured by the Constitution and laws" of the United States. In this case, Plaintiff alleges a violation of his right to be free from seizure of his person in violation of the Fourth Amendment[3] Thus, the elements of the Fourth Amendment violation become further requirements of the Plaintiff's § 1983 claim.

The Fourth Amendment provides that

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[3] Defendant Arnold argues that Plaintiff is not alleging a violation of a constitutional right, but is attempting to litigate what amounts to a malicious prosecution claim in federal court. As is discussed below, this is not the case.

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. IV.

The Fourth Amendment is made applicable to the states through the due process clause of the Fourteenth Amendment. Ker v. California, 374 U.S. 23, 30 (1963); Wolf v. Colorado, 338 U.S. 25, 27 (1949). Its provisions apply in the setting of this § 1983 civil case just as they do in the more familiar context of a suppression hearing in a criminal case. Baker, 443 U.S. at 143-47.

An individual has suffered a violation of his rights under the Fourth Amendment when three things occur. First, there must have been a seizure within the meaning of the Fourth Amendment. Arnold argues that because Wadkins turned himself in to the authorities, no seizure occurred. This point will be discussed below.

Secondly, the seizure must have been the product of "state action," meaning that the action must be attributable to the federal or state government. U.S. v Jacobsen, 466 U.S. 109, 113-14 (1984). In the case of Detective Arnold, this element is clearly satisfied: Arnold is a government official, and was acting as such at all times relevant to the claims here. On the other hand, the Bank is a private corporation. It

remains to decide whether it was clothed with state authority as is alleged.

The third element of a Fourth Amendment violation is that the seizure must have been "unreasonable." What is and is not "unreasonable" within the meaning of the Fourth Amendment is a question with which courts have struggled mightily; it is, quite simply, a question of degree to be answered in light of the facts of each case. See Brinegar v. U.S., 338 U.S. 160, 176 (1979).

The second requirement of § 1983 is that the violation of the constitutional or statutory right must have been perpetrated by one acting "under color of law." This element is closely related to the "state action" requirement for the underlying Fourth Amendment violation. Although the two terms are not identical, it seems clear that "state action" is the more inclusive of the two. In other words, if a result is the product of "state action" for purposes of the Fourth Amendment, then it may also be said to have been done "under color of law." See Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 935 (1982) (holding that state actions within meaning of Fourteenth Amendment by definition are performed "under color of law"); Fuller v. Hurley, 559 F.Supp. 313, 318 (W.D.Va. 1983) (same). Once again, the issue is whether the private corporation here acted "under color of law."

Finally, while it is not technically a "requirement" of a claim cognizable under § 1983 that the defendant be subject to suit, as a practical matter there can be no relief from a defendant who enjoys either absolute or qualified immunity. In this case, Detective Arnold has asserted a defense of

qualified immunity based on his status as a law enforcement officer. Whether or not an individual is immune to suit is a question of law, Mitchell v. Forsyth, 472 U.S. 511, 528 (1985), and is a proper issue in a motion for summary judgment.

A. Section 1983 Claims Against The Bank

As discussed above, the Fourth Amendment is addressed to state overreaching, and not that of private citizens. Section 1983, besides containing its own requirement of action "under color of law," can provide no remedy unless the underlying right – here, the Fourth Amendment – has been violated. The Bank bases its Motion for Summary Judgment on these rules of law, claiming that it was not and is not a state actor for Fourth Amendment or § 1983 purposes.

There is no question that the Bank is nominally a private organization. However, Plaintiff claims that the bank achieves state actor status because of its dealings with Bobby Arnold, a state official. If private citizens obtain significant help from state officials in the misuse of the law, then the private citizen can become clothed with state authority. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); Greco v. Guss, 775 F.2d 161,167 (7th Cir. 1985). The issue is what constitutes "significant help" from a state official.

In Lugar, the allegation was that the private defendant had violated the law by wrongfully setting a civil attachment procedure into motion. The attachment order was apparently served by a sheriff, but the sheriff's involvement ended there. The Supreme Court clearly held that this was not the

"significant help" from the state that would transform the citizen into a state actor. Lugar, 457 U.S. at 940. Other courts have held that a citizen does not become a state actor just because a police officer stands by while the citizen acts, see U.S. v. Coleman, 628 F.2d 961, 964 (6th Cir. 1980); Greco, 775 F.2d at 168, or because the citizen resorts to the legal system to resolve a problem, see Lugar, 457 U.S. at 939 n.21; Dennis v. Sparks 449 U.S. 24, 28 (1980). It has never been the law that a private citizen is transformed into a state actor simply because he or she reports a crime to the police. See Grameno v. Jewel Companies, 797 F.2d 432,435-36 (7th Cir. 1986); Morris v. University of Virginia Police Deartment, No. 96-0031-C, 1997 WL 129320, *3-4 (W.D. Va. March 19, 1997) (discussing claim under 42 U.S.C. § 1985).

By contrast, when state officials actively help a private citizen achieve illegal ends, then the citizen can fairly be said to be a "state actor." See Tulsa Prof. Collection Services v. Pope, 485 U.S. 478, 486 (1988); Jackson v. Pantazes, 810 F.2d 426 (4th Cir. 1987) (police officer used authority to gain entrance to a home); Specht v. Jensen, 832 F.2d 1516 (10th Cir. 1987) (same); Adickes v. Kress, 398 U.S. 144 (1970) (conspiracy between state officials and store to discriminate against blacks); Dennis v. Sparks, 449 U.S. 24 (1980) (bribery of judge by private citizen).

The Bank argues that there is no evidence from which a reasonable jury could conclude that the Bank and Arnold conspired to deprive Plaintiff of his rights. Thus, the Bank has made a properly supported Motion for Summary Judgment. Plaintiff cannot proceed further against the Bank

unless he has adduced evidence which would allow such a finding. The Court concludes that he has not.

By opinion dated March 19, 1998, this court dismissed the § 1983 claims against the Bank because it did not then appear that the Bank was either a state actor in its own right or that it had acted in concert with Bobby Arnold so as to fairly characterize it as a state actor. Plaintiffs ought to amend the Complaint to remedy this shortcoming, and amendment was allowed. The Bank did not reassert its Motion to Dismiss, and so the issue of whether or not the Bank is a state actor is now before the court on summary judgment.

The evidence adduced by the Plaintiff which, he argues, would allow a jury to find that the Bank was a state actor, is as follows: (1) the Bank has lost money, and thus has a motive to conspire against Wadkins; (2) the Bank waited until it became clear that Wadkins would not pay the money before calling the authorities. According to Plaintiff, this shows that the Bank knew that this was essentially a civil dispute, and only called in Detective Arnold as the final step in a debt collection process. (3) the Bank did not contact the Sheriff's Office, but contacted Arnold directly; (4) the Bank had "used" Arnold in previous bad check cases; (5) Arnold's wife works at the Bank, and thus Arnold has a motive to help the Bank if possible; (6) a Bank employee, in her deposition testimony, referred to Arnold as "an investigator for the Bank," and (7) Arnold, though an experienced police officer, performed only a cursory investigation before charging Wadkins.

Arnold, on the other hand, has testified that this was the only time he had ever dealt with Roberta Looney, (Arnold dep. at 17), that he never discussed the criminal charges with her, (id. at 48), and that he told her only that he would "check on" the situation, (id. at 52). He has further testified that his wife's position at the Bank had nothing to do with his decision to prosecute, (id. at 69), and that neither Looney nor the Bank had any influence on the decision, (id. at 70-73).

The court is of the opinion that even when this evidence is viewed in the light most favorable to Wadkins and all reasonable inferences are drawn in his favor, a reasonable jury could not proceed from it to a finding that the Bank is a state actor. While it is proper to consider circumstantial evidence in cases such as this, see U.S. v. Wilson, 135 F.3d 291, 306 (4th Cir. 1998), the Plaintiff's evidence is circumstantial in the extreme. The evidence is helpful to the Plaintiff only if a jury were to engage in the building of inferences upon inferences upon inferences.

More importantly, as a matter of law, this is simply not the kind of interaction between state official and private citizen contemplated by the case law on the issue. In Adickes v. Kress, 398 U.S. 144 (1970), there was an agreement between a store and the police to discriminate against black persons. In Dennis v. Sparks, 449 U.S. 24 (1980), there was a bribery scheme between a citizen and a judge. In Wagenmann v. Adams, 829 F.2d 196 (1st Cir. 1987), cited by the Plaintiff, a private citizen used his influence with the chief of police to have an individual arrested on false charges so that a wedding might not be disturbed. In all of these cases, the private citizen convinced or reached an agreement with the state official to violate the law. By contrast, in this case, the

evidence shows only that the Bank tries to use a certain investigator on all of its bad check cases. There may be facts which would lead a jury to decide that Bobby Arnold shows favoritism toward the Bank, or that the Bank understands that Arnold will be especially zealous in his investigation of cases in which they are involved, or that the Bank is in the enviable position of being able to obtain law enforcement assistance without going through the channels that other citizens must use. But this is not against the law. When a police officer, in his or her discretion, bestows a favor upon a private citizen, that citizen does not thereby automatically become a state actor.

There is certainly an allegation that Bobby Arnold stepped outside the bounds of the law. There may be facts which would allow a jury to so find. But there is simply no evidence that would allow a jury to do more than speculate that he and the Bank agreed to take those steps, or even that the Bank urged that those steps be taken. Plaintiff correctly states that Adickes stands for the proposition that a private citizen who conspires with a law enforcement officer to have a person illegally arrested can be said to be a state actor. But there is no evidence of such a conspiracy here. The evidence shows only that the Bank turned the case over to Arnold.

Because there is not sufficient evidence to allow a jury to find that Arnold and the Bank conspired to violate Plaintiff's rights, there is no basis upon which to conclude that the Bank was a state actor. This being the case, the Bank cannot have violated Wadkins' Fourth Amendment rights. Accordingly, the Bank's Motion For Summary Judgment as to the § 1983 claims is GRANTED. The court declines to exercise jurisdiction over the remaining pendant state-law

claims against the Bank, and accordingly dismisses those claims without prejudice.

B. Section 1983 Claims Against Detective Arnold

Bobby Arnold argues that he is entitled to judgment as matter of law as to the § 1983 claims for several reasons. Although all of Detective Arnold's arguments are couched in terms of qualified immunity, several actually go to the validity of the underlying Fourth Amendment claim as well.

Arnold first argues that Wadkins has simply not advanced a cognizable claim. According to Arnold, Wadkins has asserted nothing more than a claim of malicious prosecution, which does not rise to a constitutional level. Arnold correctly recites that the Supreme Court decision in Albright v. Oliver, 510 U.S. 266 (1994), has foreclosed such a claim under the Fourteenth Amendment, and argues that such claims have been implicitly foreclosed under the Fourth Amendment. The court disagrees with that notion, and also disagrees with the notion that Wadkins has not claimed a violation of his constitutional rights.

The allegation here is that Wadkins was seized in violation of the Fourth Amendment. The Complaint tells us this in so many words. (First Amended Complaint at 3.) Arnold himself characterizes the claim as such. (Memorandum in Support of the Motion for Summary Judgment at 8.) This is plainly a cognizable claim of deprivation of rights guaranteed by the Constitution. Such claims have been recognized by the Supreme Court, see Malley v. Briggs, 475 U.S. 35 (1986), the Fourth Circuit, see Porterfield v. Lott, 156 F.3d 563 (4th Cir. 1998); Brooks v.

City of Winston-Salem, 85 F.3d 178 (4th Cir. 1996), and the Western District of Virginia, see Lewis v. McDorman, 820 F.Supp. 1001 (W.D. Va. 1992).

Arnold argues that even if the Fourth Amendment does espouse claims such as Wadkins', the law in this area is sufficiently unsettled so that he should enjoy qualified immunity. Qualified immunity is discussed in detail below as it pertains to probable cause. On this issue, however, little discussion is required. First, Arnold's argument that the law is unclear is derived from the above-mentioned case of Albright v. Oliver, the case in which the Supreme Court held that the Fourteenth Amendment does not provide a guarantee against prosecution without probable cause. However, the Court held just as clearly that the decision had no bearing on claims under the Fourth Amendment. Albright, 510 U.S. at 275. Secondly, the cases cited above demonstrate that it was clearly established as of the time of Wadkins' arrest that the Fourth Amendment is implicated when a law enforcement officer acts pursuant to arrest warrants unsupported by probable cause. In particular, the Fourth Circuit decision in Brooks, decided before Detective Arnold elected to have Wadkins arrested and citing earlier Supreme Court precedent, cleared up any doubts. The Brooks court held that "Brooks' allegations that [the officer] seized him pursuant to legal process that was not supported by probable cause and that criminal proceedings terminated in his favor[4] are sufficient to

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[4] The Commonwealth's Attorney moved for the entry of an order of nolle prosequi as to both charges brought against Wadkins. Under Virginia law, an order of nolle prosequi can operate as termination of the prosecution in favor of the accused. Snyder v. City of Alexandria, 870 F.Supp. 672, 677-78 n.17

state a § 1983 malicious prosecution claim alleging a seizure that was violative of the Fourth Amendment." Brooks, 85 F.3d at 183-84. On this issue, this case is not distinguishable from Brooks.

Arnold next argues that because Wadkins turned himself in to the authorities rather than be apprehended, Wadkins was never seized within the meaning of the Fourth Amendment. This is not the law. It is clear that "surrender to the State's show of authority constitute[s] a seizure for purposes of the Fourth Amendment." Albright, 510 U.S. at 271.

Fourth, Arnold argues that in any event, even though he obtained the arrest warrants, it was not he who seized the Plaintiff. The court finds no merit in this argument, and Arnold has offered no authority for this position. It would be somewhat absurd to hold that a law enforcement officer could maliciously set the wheels of the criminal justice system into

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(E.D.Va. 1994); Garrick v. Kelly, 649 F.Supp. 607, 612 (E.D.Va. 1986). However, an order of nolle prosequi may not so operate where the prosecutor and the accused reach some sort of compromise - the decision not to prosecute under such circumstances does not necessarily mean that the prosecution was unjustified. Garrick, 649 F.Supp. at 610-11. Detective Arnold has not argued that the prosecution here did not terminate in Wadkins' favor. Moreover, if this element of Wadkins' case is put in issue, and conflicting evidence is introduced, the question will be one for the jury, not the court. Id. The court offers no opinion on the issue at this time, except to say that it will not be raised sua sponte at the summary judgment stage.

motion, then escape any liability simply by making sure that he or she never personally touches the arrestee. Furthermore, as discussed above, surrender by a wanted individual can, without more, amount to seizure. It makes little sense to extend or withhold liability based upon the identity of the officer to whom the individual surrenders.

Finally, Arnold argues that even if he did violate the Plaintiff's Fourth Amendment rights, he is entitled to qualified immunity, because he acted reasonably in causing the warrants to issue. To avoid excessive disruption of government, a qualified immunity is recognized to protect government officials performing discretionary functions from civil damage suits insofar as the officials' conduct does not violate the clearly established rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In a case such as this, the qualified immunity analysis is governed by the principle set out in Malley v. Briggs, 475 U.S. 335 (1986). An officer who obtains an arrest warrant from a magistrate and acts pursuant to that warrant is entitled to qualified immunity unless the warrant application is so lacking indicia of probable cause as to render official belief in its existence unreasonable. Malley, 475 U.S. at 344-45; see also Porterfield v. Lott, 156 F.3d 563, 570 (4th Cir. 1998).

The facts are undisputed except as noted. Both parties are in agreement as to how Detective Arnold investigated the alleged crimes and what information he obtained before seeking the warrants. Thus, it falls to the court to decide, as a matter of law, whether Detective Arnold could have reasonably believed that the warrants issued for David

Wadkins were supported by probable cause. See Gould v. Davis, No. 97-1777, 1998 WL 910151, *5 (4th Cir. Dec. 31, 1998) (explaining that whether or not a certain set of facts would lead a reasonable officer to act is a question of law, not fact). The court will accomplish this task by examining all the facts and circumstances with which Detective Arnold was faced.[5]

The court holds that Detective Arnold is not entitled to qualified immunity for his actions in seeking the arrest of Wadkins on either charge. Each charge will be discussed in

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[5] While Supreme Court and Fourth Circuit precedent in the area of qualified immunity is fairly uniform as to substance, the recent decision of the Fourth Circuit in Gould v. Davis, No. 97-1777, 1998 WL 910151 (4th Cir. Dec. 31, 1998) leaves the court in a quandary as to the semantics of qualified immunity analysis. Some courts begin by assuming that the requirements of the Fourth Amendment are clearly established, and then go on to examine the specifics of the case. See Malley v. Briggs, 475 U.S. 335 (1986); Porterfield v. Lott, 156 F.3d 563 (4th Cir. 1998); Smith v. Reddy, 101 F.3d 351 (4th Cir. 1996). Other courts define the clearly established right by including the facts of the case. See Anderson v. Creighton, 483 U.S. 635 (1987); Gould, 1998 WL 910151 at *7 (criticizing the approach of the Smith court). However, both lines of cases teach the same principle, namely, that the court should not leap from a finding that the Fourth Amendment is clearly established to a denial of qualified immunity without examination of the facts. The court adheres to this principle, and thus follows all of these cases. For purposes of description, the court has drawn on the language of the cases most clearly on point, Malley and Porterfield.

turn below, but before turning to that discussion, the court feels compelled to clarify the procedural posture in which this case is presented. By holding that Detective Arnold is not entitled to summary judgment on the basis of qualified immunity, the court expresses no opinion as to whether or not Detective Arnold may prevail at trial on this or any other theory. It is true that there is little dispute of fact here, but even so, a finding that Arnold is not entitled to summary judgment does not equate to a finding of liability on his part, for several reasons. First, the court has viewed all the evidence before it in a light most favorable to the Plaintiff. Second, further evidence may be produced at trial. Finally, the Plaintiff has not moved for summary judgment. At most, the denial of Arnold's Motion means that the case will go forward to trial.

i. The Forgery Charge

Probable cause exists when the facts and circumstances within an officer's knowledge and of which he or she has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed. Brinegar v. U.S., 338 U.S. 160, 175-76 (1979). While Arnold may be entitled to qualified immunity even the warrants were not, in fact, supported by probable cause, see Hunter v. Bryant, 502 U.S. 224, 226-27 (1991), this standard provides the starting point in deciding whether he could have reasonably believed that probable cause was present.

A person is guilty of forgery, as defined in Va. Code § 18.2-172, if he or she "forge[s] any writing . . . to the prejudice of another's right, or utter[s], or attempt[s] to

employ as true, such forged writing, knowing it to be forged. . . ."

The essence of the forgery charge was that David Wadkins had forged the signature of David Shiwpal on a check, which Lisa Wadkins then cashed, to the detriment of the Bank. The sum total of the information in Bobby Arnold's possession was that Arnold himself had compared a signature that Lisa Wadkins had said was that of David Wadkins with a signature that Lisa Wadkins said was that of David Shiwpal and thought them similar, that Roberta Looney had expressed a similar opinion based on her own comparisons, that the various Shiwpal checks bore different social security numbers and addresses, that the supposedly forged check was returned due to insufficient funds, and that a large number of bad checks had surfaced in connection with the Wadkins account.

Neither Arnold nor Looney is trained in handwriting comparison. The court does not hold that non-expert comparison can never be a factor in assessing probable cause. But the comparison here would have been questionable even if both Arnold and Looney were experts at it, since it was never verified that David Wadkins had signed the AIC check that both Arnold and Looney used as a benchmark. It should have appeared just as possible to Arnold – perhaps more so – that Lisa Wadkins forged both checks.

Most importantly, the court cannot hold that Arnold is entitled to judgment as a matter of law, when, faced with these facts, he failed to contact David Shiwpal. For purposes of this Motion, the court finds that a reasonable officer should at least have contacted Shiwpal and asked him if the disputed

signature was his. See Clipper v. Takoma Park, 876 F.2d 17, 20 (4th Cir. 1989) (holding that an officer's failure to seek an easily obtainable piece of information that could completely exculpate a suspect is a factor in judging the officer's reasonableness for purposes of qualified immunity); Sevigny v. Dicksey, 846 F.2d 953, 957 (4th Cir. 1989) (same). Shiwpal has testified by affidavit that Wadkins has never forged his signature, and it may be assumed that if Arnold had asked him, Shiwpal would have told him this. Arnold has testified that he attempted to contact Shiwpal several times, both in person and by phone, and met with no success. The court understands that this was frustrating to Detective Arnold. However, the fact that an investigation has come to a standstill does not automatically mean that it is a proper time to seek arrest warrants.

The statement of Shiwpal is such a key piece of evidence that, even though it may have been slightly harder to obtain than the evidence in Clipper or Sevigny, the court holds that under the evidence presented thus far, a reasonable officer should have obtained it before seeking the warrants. Under the facts as they appear now, it seems that Arnold was merely guessing when he decided that the signature on the Shiwpal check was not Shiwpal's and not authorized by him. The further conclusion that the signature was made by David Wadkins seems to be the product of even less reasonable guesswork.

Much has been made by both parties of the circumstances surrounding these charges. Detective Arnold asks the court to recognize that it takes only common sense to see that David Wadkins, Lisa Wadkins, and perhaps several others were engaged in an organized scheme of writing bad

checks. Arnold points out the sheer number of bad checks associated with the Wadkins and their account, as well as certain statements and behavior of an incriminating nature on the part of Lisa Wadkins. According to Arnold, these facts strongly support his belief that the warrants were valid. David Wadkins, on the other hand, warns the court not to use the shorthand of "guilt by association." The court disagrees with both parties.

It is true that surrounding circumstances, even circumstances that appear innocent when considered alone, may provide a basis for finding probable cause. Porterfield v. Lott, 156 F.3d 563, 570 (4th Cir. 1998). To a limited extent, what Wadkins terms "guilt by association" is a permissible inference at the probable cause stage of a criminal prosecution. Wadkins is thus incorrect when he argues that Arnold should not have considered the behavior of Lisa Wadkins and others in his decision to arrest David Wadkins. Arnold could have suspected that the Wadkins and others were engaged in some kind of illegal scheme. It is hard to believe that even the most absentminded individual could write 40 bad checks by accident. David Wadkins is the husband of Lisa and his name, and perhaps even his signature, had surfaced in connection with the bad checks. Arnold's mistake, however, was in leaping from these facts, without more, to accusations of two felonies.

The fact that Arnold obtained the warrant from an impartial magistrate does not change the court's conclusions. The law is well-settled that if a reasonable officer should not have applied for a warrant, i.e. the request is outside the range of the professional competence expected of an officer, that officer is not shielded by the magistrate's subsequent

error in issuing the warrants. Malley v. Briggs, 475 U.S. 335, 345-46 (1986). Furthermore, from the evidence so far, it appears that the magistrate deferred completely to what he perceived to be the decision of the Commonwealth's Attorney, and thus abandoned his role as an impartial judicial officer.

A more interesting issue is presented by Arnold's conference with the Commonwealth's Attorney.[6] As noted above, the magistrate initially refused to issue warrants, and recommended that Arnold speak with the prosecutor. Arnold did so, and now argues that he is entitled to immunity based on what he terms the "advice of counsel defense," a defense that has been traditionally recognized in the context of malicious prosecution suits. The court is not persuaded.

First of all, this defense cannot operate in this constitutional case in the same manner as it does in claims of malicious prosecution, that is, by negating an element of the tort.[7] It is true that malicious prosecution is the tort that is most analogous to a § 1983 claim of prosecution without

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[6] Wadkins has argued that the court should not consider the statements of the magistrate or the Commonwealth's Attorney, because both are hearsay. The court considers these statements only to the extent that they may or may not have led Arnold to reasonably think that the warrants were supported by probable cause. Since the court is unconcerned at this point with the truth of the statements, the statements are not hearsay and may be considered.

[7] The defense will operate in the usual manner with regard to the state-law malicious prosecution claim, discussed below.

probable cause in violation of one's Fourth Amendment rights. Brooks v. City of Winston-Salem, 85 F.3d 178, 182 (4th Cir. 1996) (citing Heck v. Humphrey, 512 U.S. 483, 484 (1994)). However, there are key differences between the state-law tort and the constitutional claim. The tort requires a showing of malice, whereas the constitutional claim does not. Brooks, 85 F.3d at 185 n.5. The constitutional claim hinges solely on the presence or absence of probable cause, and probable cause exists or does not exist regardless of the subjective attitude - malicious or not - of the charging officer. Id. (citing Graham v. Connor, 490 U.S. 386, 396-97 (1989)). "Advice of counsel" is a defense that operates by showing good faith and negating malice on the part of the officer, and so it has no application to the constitutional claim here.[8] In other words, probable cause within the meaning of the Fourth Amendment exists or does not exist regardless of the advice one receives from one's lawyer. If the advice of the prosecutor is to play a part in this case at all, it should be considered along with all of the other circumstances that bear

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[8] There is authority for the proposition that "advice of counsel" goes to the existence of probable cause as well as to the existence of malice. In Bill Edwards Oldsmobile, Inc. v. Carey, 244 S.E.2d 767, 772 (Va. 1978), the court held that "[w]hen the defendant has acted in good faith upon the advice of reputable counsel, after a full disclosure of the facts, probable cause is established, even if the advice is incorrect." It seems clear, however, that in making this statement the court was not discussing probable cause within the meaning of the Fourth Amendment. As the discussion above points out, the Supreme Court has made it clear that "good faith" plays no part in deciding whether probable cause within the meaning of the Fourth Amendment exists or not.

on whether Arnold was objectively reasonable in seeking the warrants.[9]

Having said this, the court finds that for purposes of this Motion, the advice of the Commonwealth's Attorney does not operate to make Arnold's actions objectively reasonable within the meaning of the qualified immunity analysis. The evidence submitted regarding the prosecutor's advice, when viewed in the light most favorable to Wadkins, does not entitle Arnold to judgment as a matter of law. The court notes, however, that Arnold may be expected to raise this point again. Arnold has testified, unequivocally, that the Commonwealth's Attorney instructed him to bring the charges against Wadkins. The Plaintiff has not directly attacked this statement, and so the court accepts this as an undisputed fact. However, the court agrees with the Plaintiff that there is not enough evidence in the record for the court to decide, as a matter of law, that the advice of the prosecutor rendered Arnold's acts objectively reasonable. We do not know exactly what evidence Arnold presented to the Commonwealth's Attorney. Arnold says only that he showed the prosecutor the checks. (Arnold dep. at 59-60). Common sense tells us that Arnold did some explaining – he did not simply enter the prosecutor's office and mutely display various checks to him. But the record does not reveal what was said. It may be that Arnold fully disclosed the extent of

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[9] Arnold does not enjoy any more extensive immunity than Harlow-type qualified immunity as a result of his conference with the prosecutor. Indeed, the prosecutor himself enjoys only qualified immunity in his role as advisor to the police on questions of probable cause. Burns v. Reed, 500 U.S. 478, 495 (1991).

his investigation, and that the Commonwealth's Attorney made his own examination of the evidence and ordered Arnold to seek the warrants. On the other hand, Arnold may have offered so little information to the prosecutor that he cannot be said to have acted reasonably even if he acted on the prosecutor's advice. These facts must be determined by a jury. It would be premature for the court to offer an opinion on this point, other than to hold that Arnold is not entitled to judgment as a matter of law upon the mere showing that he consulted with the Commonwealth's Attorney and was, in his words, told to bring the charges. (Arnold dep. at 26, 60.)

ii. The False Pretenses Charge

A person is guilty of obtaining money by false pretenses, as defined in Va. Code § 18.2-178, if he or she "obtain[s], by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, . . . or if he obtain[s], by any false pretense or token, with such intent, the signature of any person to a writing, the false making whereof would be forgery. . . ."

There is no dispute as to what information Detective Arnold had. AIC, an insurance company, issued a check to David Wadkins and Americredit as joint payees. Lisa Wadkins showed the teller at the Bank two signatures which she claimed were those of David Wadkins. One of these signatures was apparently in a block reserved for the endorsement of Americredit. Americredit never did endorse the check, and the Bank was unable to recoup the money advanced to the Wadkins in reliance on the check. From these facts, as well as the surrounding circumstances

discussed above, Arnold developed the belief that Wadkins was attempting to impersonate or bypass either Americredit or AIC by providing the second endorsement himself. This is far from probable cause to arrest David Wadkins.

The court must first address the aforementioned confusion as to whether Arnold thought Wadkins was attempting to impersonate Americredit, the payee, or AIC, the maker. Arnold's deposition is confusing. At one point, he seems to say that Wadkins signed where AIC should have, (Arnold dep. at 66), then states that he thought Wadkins was supplying the signature of Americredit, (id. at 67), then is prompted by his lawyer to correct the name to AIC, (id.). These are likely innocent mistakes. However, for proposes of this Motion, Arnold is not entitled to the benefit of the doubt. Plaintiff argues that these contradictory statements are a last-ditch attempt by Arnold to explain his actions. Since the warrant application and warrant both present the theory that Wadkins was impersonating Americredit, it would undercut Arnold's claim of objective reasonableness if it turns out that he really thought Wadkins was impersonating AIC. Viewing this evidence in the light most favorable to Wadkins, the court concludes that this testimony is one reason – albeit not an especially telling one – to deny Arnold judgment as a matter of law. A jury should decide as a matter of fact what Arnold's theory was.

Secondly, even if Arnold has always intended to accuse Wadkins of impersonating Americredit, he still is not entitled to judgment as a matter of law. One who signs a check in the wrong place has not committed the offense of obtaining money by false pretenses, unless it was done with criminal intent. See Va. Code § 18.2-178. Under these facts,

no reasonable officer could infer such intent on the part of David Wadkins. It is difficult to imagine that an individual bent on fraud would attempt to provide the signatures of two different people by signing his own name twice. It cannot be said that a reasonable officer could have concluded that David Wadkins was really trying to fool anyone into thinking that he was not only a client of Americredit, but also an official of Americredit or a person authorized to sign a check on Americredit's behalf. If there was evidence that David Wadkins signed "John Doe" in the space reserved for Americredit, a different result might obtain. But it seems that there appeared in the Americredit box the one signature that no one could think was that of an Americredit official. Indeed, it is difficult to understand why the Bank accepted the check.

The court reaches the same result even if it is assumed that Lisa Wadkins made some statement to the teller to the effect that the check was properly endorsed. Even if true, this does little to establish probable cause to arrest David Wadkins. Moreover, the teller who accepted the check testified that even after she spoke with Lisa, she did not believe that David Wadkins had endorsed the check on behalf of Americredit. (Robinson dep. at 31.)

The discussion above regarding the legal effect of Arnold's consultation with the Commonwealth's Attorney and the magistrate and his consideration of all the surrounding circumstances applies with equal force to this charge as well.

C. State Law Claims

Wadkins has also asserted the state-law claims of defamation and malicious prosecution. Arnold has not moved for summary judgment on the defamation claim, and so we turn to the claim of malicious prosecution.

In Virginia, the elements of malicious prosecution are that (1) the prosecution was instituted by or with the cooperation of the defendant; (2) the prosecution terminated in a manner not unfavorable to the plaintiff; (3) the prosecution was instituted without probable cause; and (4) the defendant acted with malice. Hudson v. Lanier, 497 S.E.2d 471, 473 (Va. 1998).

As is obvious from the facts recited above, the prosecution here was instituted by Bobby Arnold. As discussed in footnote 4 above, it appears that the prosecution terminated in favor of Wadkins. At the very least, this may become a question for the factfinder. As to the third element, and consistent with the denial of Arnold's plea of qualified immunity, the court cannot say as a matter of law that there was probable cause to institute the prosecution. Bobby Arnold is not entitled to summary judgment on this point.

The final element is the most hotly contested. "Malice," as the term applies to malicious prosecution, is defined as "any controlling motive other than a good faith desire to further the ends of justice, enforce obedience to the criminal laws, suppress crime, or see that the guilty are punished." Hudson, 497 S.E.2d at 473. Wadkins argues correctly that malice can be inferred from a decision to prosecute without probable cause. See Lewis v. McDorman,

820 F.Supp. 1001, 1005 (W.D.Va. 1992); Oxenham v. Johnson, 402 S.E.2d 1, 5 (Va. 1991). Of course, this court has not held, and has not been asked to hold, that there was no probable cause for the prosecution of David Wadkins. The court has held only that Bobby Arnold is not entitled to judgment as a matter of law on the issue. However, Wadkins claim still survives summary judgment. Virginia courts have held that "the existence of malice is generally a question to be resolved by the fact finder from all the circumstances of the case." Hudson, 497 S.E.2d at 473. The Plaintiff has adduced sufficient evidence that would allow a jury to find, or at least infer, that Arnold acted maliciously.

The "advice of counsel" defense discussed above is properly raised here. However, this is an affirmative defense. Bain v. Phillips, 228 S.E.2d 576, 583 (Va. 1976). Thus, the Defendant carries the burden usually assigned to a plaintiff moving for summary judgment, i.e. the defendant must adduce evidence which supports the existence of each element of his affirmative defense, and the evidence must be "so powerful that no reasonable jury would be free to disbelieve it." Herndon v. Mass. Gen. Life Ins. Co., 28 F.Supp.2d 379, __ (W.D.Va. 1998); 11, James Wm. Moore, et al., Moore's Federal Practice § 56.13(1) (3rd ed. 1987) (citing Brown v. Valentine, 240 F.Supp. 539, 539 (W.D. Va. 1965)). In order to avail himself of the "advice of counsel" defense, "[t]he defendant must prove that he sought advice of counsel with an honest purpose of being informed of the law, that he made a full, correct and honest disclosure of all material facts known to him or which he reasonably should have known, and that he acted in good faith guided by the advice given by counsel." Pallas v. Zaharopoulos, 250 S.E.2d 357, 359-60 (Va. 1979). The Virginia Supreme Court

has stated that "[t]his defense usually presents a jury question unless reasonable minds cannot differ that advice of counsel has been established." Id. In this case, as noted above, the evidence as to the substance of the conversation between the Commonwealth Attorney and Arnold is ambiguous at best. Arnold has not met the burden of establishing the "advice of counsel" defense as a matter of law.

IV. Conclusion

The court has denied Detective Arnold the protection of qualified immunity, even though it appears that at the time of his actions, he was engaged at least in part in the noble enterprise of ferreting out crime. Further, after reflecting on the facts, the court cannot say that Arnold was not on the trail of an active bad check "ring." But from the evidence thus far, it appears that David Wadkins' civil rights may have been trampled in the process.

A law enforcement officer cannot charge an individual with a certain crime just because the officer thinks the circumstances so suspicious that the individual must be guilty of something. The court is mindful of the fact that a felony charge is an effective way to get an individual's attention, and there is no doubt that the pieces of a criminal investigation often begin falling into place once a suspect hears the door of the jailhouse slam behind him. But the Fourth Amendment will not allow the ends of an investigation to justify the means. Application for a felony arrest warrant should properly mark the culmination, and not the commencement, of a criminal investigation. Wadkins is entitled to a trial to determine whether Arnold transgressed these principles.

For these reasons, Detective Arnold's Motion for Summary Judgment is DENIED as to the § 1983 claim and the state-law claims of malicious prosecution and defamation. As noted previously, the Bank's Motion for Summary Judgment is GRANTED as to the § 1983 claim. The court declines to exercise jurisdiction over any remaining state law claims against the Bank, and dismisses those claims without prejudice.

ENTER: This 19th day of February, 1999.

/s/_____
Glen W. Williams
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Filed June 30, 2000]

No. 99-1370

DAVID WADKINS,
Plaintiff-Appellee,

v.

ROBERT ARNOLD,
Defendant-Appellant,

and

THE FIRST BANK & TRUST COMPANY,
Defendant.

On Petition for Rehearing En Banc

The appellee's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/_____
Patricia S. Connor
CLERK